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2  
3 UNITED STATES DISTRICT COURT  
4 FOR THE EASTERN DISTRICT OF CALIFORNIA  
5

6 RAUL PIZANA, individually and on  
7 behalf of all others similarly situated,

8 Plaintiff,

9 v.

10 SANMEDICA INTERNATIONAL, LLC,  
11 and DOES 1 through 10, inclusive,

12 Defendants.

No. 1:18-cv-00644-DAD-SKO

ORDER ON DEFENDANT’S MOTION TO  
PARTIALLY QUASH OR MODIFY  
SUBPOENA TO THE FEDERAL TRADE  
COMMISSION

(Doc. 113)

13 This matter is before the Court on Defendant SanMedica International, LLC  
14 (“Defendant”)’s “Motion to Partially Quash or Modify Subpoena to the Federal Trade  
15 Commission” (the “Motion to Quash”). (Doc. 113.) Defendant and Plaintiff Raul Pizana  
16 (“Plaintiff”) filed their joint statement directed to the Motion to Quash (the “Joint Statement”), as  
17 required by this Court’s Local Rule 251, on December 30, 2020. (Doc. 126.) The Court reviewed  
18 the parties’ papers and all supporting material and found the matter suitable for decision without  
19 oral argument. The hearing set for January 6, 2021, was therefore vacated. (Doc. 129.)

20 Having considered the Joint Statement and its exhibits, and for the reasons set forth below,  
21 Defendant’s Motion to Quash will be construed as a motion for a protective order pursuant to  
22 Federal Rules of Civil Procedure 26(c) and granted in part and denied in part.

23 **I. BACKGROUND**

24 Plaintiff filed this putative class action on May 9, 2018, challenging the advertising and  
25 efficacy of SeroVital-hgh (the “Product”), a purported Human Growth Hormone (“HGH”)  
26 supplement produced by Defendant that was purchased by Plaintiff in early 2017. (Doc. 53,  
27 Second Am. Compl. (“SAC”) at ¶¶ 1, 6, 9.) The Second Amended Complaint, filed on November  
28 13, 2019, asserts three causes of action: (1) a violation of California Civil Code § 1750, *et. seq.*,

1 the Consumer Legal Remedies Act (“CLRA”); (2) a violation of California Business & Professions  
 2 Code § 17500, *et. seq.*, the False Advertising Law (“FAL”); and (3) a violation of California  
 3 Business & Professions Code § 17200, *et. seq.*, the Unfair Competition Law (“UCL”). (SAC at  
 4 ¶¶ 60–121.).

5 The crux of Plaintiff’s suit is that Defendant’s Product, despite being marketed as an HGH  
 6 supplement that can “make users look and feel decades—not years, but *DECADES*—younger,” is  
 7 “no more effective for its advertised purposes than a placebo[] and is therefore worthless to  
 8 California consumers[.]” (SAC at ¶¶ 1–5.) Specifically, Plaintiff alleges:

9 (1) [T]he Product cannot increase HGH levels whatsoever, let alone by 682%; (2)  
 10 the Product does not reduce wrinkles, “decrease[] body fat,” “increase[] lean  
 11 muscle mass,” strengthen bones, “improve[] mood,” “heighten[] sex drive,” or  
 12 make “users look and feel decades ... younger” because the oral administration of  
 13 amino acids like SeroVital does not increase growth hormone bioactivity; (3) there  
 is no causal link between increased HGH levels and most of the claimed uses,  
 including wrinkle reduction, increased lean muscle mass, stronger bones, improved  
 mood, [or] heightened sex drive; and (4) if SeroVital were to increase HGH levels  
 as claimed, it would cause significant health risks.

14 (*Id.* at ¶ 2.)

15 Plaintiff seeks to assert claims on behalf of a proposed class defined as:

16 All persons residing in California who purchased the Product for personal use and  
 17 not for resale during the time period May 9, 2014, through the present. Excluded  
 18 from the Class are Defendant’s officers, directors, and employees, and any  
 individual who received remuneration from Defendant in connection with that  
 individual’s use or endorsement of the Product.

19 (SAC ¶ 50.) On March 6, 2020, the Court entered a scheduling order that bifurcated merits from  
 20 class certification discovery and set a deadline of December 18, 2020, for class discovery only.<sup>1</sup>

21 (*See* Doc. 74.)

22 On December 2, 2020, Plaintiff served a subpoena (the “Subpoena”) on the Federal Trade  
 23 Commission (“FTC”), requesting ten categories of documents pertaining to Defendant and ten  
 24 other non-party companies, collectively referred to as the “Basic Research Enterprise,” and the  
 25 Product and two other products (Growth Factor-9 (“GF-9”) and Thrive-hgh) not identified in the  
 26

27  
 28 <sup>1</sup> The parties agreed in their joint scheduling report that discovery in this case should be bifurcated. (*See* Doc. 71 at 5.)

1 SAC.<sup>2 3</sup> (*See* Doc. 126-1 at 7–8, 13–14.) On December 11, 2020, Defendant filed the instant  
 2 motion. (Doc. 113.)

## 3 II. LEGAL STANDARDS

### 4 A. Discovery Generally

5 Federal Rule of Civil Procedure 26(b)(1) provides that parties

6 [m]ay obtain discovery regarding any nonprivileged matter that is relevant to any  
 7 party's claim or defense and proportional to the needs of the case, considering the  
 8 importance of the issues at stake in the action, the amount in controversy, the parties  
 9 relative access to relevant information, the parties' resources, the importance of the  
 discovery in resolving the issues, and whether the burden or expense of the  
 proposed discovery outweighs its likely benefit.

10 Fed. R. Civ. P. 26(b)(1).

11 Motions for protective orders are governed by Rule 26(c), which states in relevant part:

12 A party or any person from whom discovery is sought may move for a protective  
 13 order in the court where the action is pending[.] The motion must include a  
 14 certification that the movant has in good faith conferred or attempted to confer with  
 15 other affected parties in an effort to resolve the dispute without court action. The  
 court may, for good cause, issue an order to protect a party or person from  
 annoyance, embarrassment, oppression, or undue burden or expense[.]

16 Fed. R. Civ. P. 26(c). District courts have broad discretion to determine whether a protective order  
 17 is appropriate and, if so, what degree of protection is warranted. *Seattle Times Co. v. Rhinehart*,  
 18 467 U.S. 20, 36 (1984); *see also Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d  
 19 1206, 1211–12 (9th Cir. 2002). The party seeking to limit discovery has the burden of proving  
 20 “good cause,” which requires a showing “that specific prejudice or harm will result” if the  
 21 protective order is not granted. *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d  
 22 417, 424 (9th Cir. 2011) (citing *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th  
 23 Cir. 2003)).

24 <sup>2</sup> On December 23, 2020, Plaintiff filed a motion for leave to file a third amended complaint (Doc. 118), which is  
 25 pending. The motion seeks to amend the operative complaint to add: as defendants the ten other companies that are  
 26 part of the Basic Research Enterprise; as plaintiffs other persons who have purchased the Product, GF-9, Thrive-hgh,  
 or SeroDyne in California within the past three years; and claims alleging a violation of the Racketeer Influenced and  
 Corrupt Organizations (“RICO”) Act, 18 U.S.C. § 1962(a), (c)–(d), and mail and wire fraud, 18 U.S.C. §§ 1341, 1343.  
 (See Doc. 118.)

27 <sup>3</sup> In June 2004, the FTC commenced an administrative action against some of the constituent companies of the Basic  
 28 Research Enterprise for false advertising, and the action resolved about two years later via a consent agreement, which  
 is still in effect. (*See* Doc. 126 at 10–11; Doc. 117-4.)

Under Federal Rule of Civil Procedure 45(a)(1)(C), a party may subpoena a nonparty to produce documents, electronically stored information, and tangible things. The Ninth Circuit has “yet to address the question of whether a party has standing to bring a motion to quash since usually only the subpoenaed non-party may move to quash. The general rule, however, is that a party has no standing to quash a subpoena served upon a third party, except as to claims of privilege relating to the documents being sought.” *California Sportfishing Prot. All. v. Chico Scrap Metal, Inc.*, 299 F.R.D. 638, 643 (E.D. Cal. 2014) (citing *Windsor v. Martindale*, 175 F.R.D. 665, 668 (D. Colo. 1997)); see *Krenitsky v. Kirsch*, No. 218CV0690WBSDBP, 2020 WL 5017270, at \*1 (E.D. Cal. Aug. 25, 2020) (collecting cases). “Under this general rule, [a party] lacks standing to object to the subpoena on grounds of relevance or undue burden.” *Krenitsky*, 2020 WL 5017270, at \*1 (citing *Wells Fargo & Co. v. ABD Ins.*, No. C 12-03856 PJH DMR, 2012 WL 6115612, at \*2 (N.D. Cal. Dec. 10, 2012)). “A party cannot seek to quash a Rule 45 subpoena except to the extent that it has a personal right or privilege in the information sought to be disclosed.” *Id.* (citation and internal quotation marks omitted).

#### **B. Discovery in the Class Action Context**

“Generally at the pre-class certification stage, discovery in a putative class action is limited to certification issues such as the number of class members, the existence of common questions, typicality of claims, and the representative’s ability to represent the class.” *Gusman v. Comcast Corp.*, 298 F.R.D. 592, 595 (S.D. Cal. 2014) (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 359 (1978)). “Precertification discovery lies entirely within the court’s discretion.” *Doherty v. Comenity Capital Bank & Comenity Bank*, No. 16CV1321-H-BGS, 2017 WL 1885677, at \*3 (S.D. Cal. May 9, 2017) (citing Fed. R. Civ. P. 23). See also *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 942 (9th Cir. 2009) (citing *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1313 (9th Cir. 1977)) (“District courts have broad discretion to control the class certification process.”). A court does not abuse its discretion in refusing to authorize precertification discovery when the plaintiff fails to advance a *prima facie* showing that the class requirements [*i.e.*, numerosity, commonality, typicality and adequacy of representation] of Rule 23 are satisfied or that “discovery is likely to produce substantiation of class allegations.” *Mantolete v. Bolger*, 767

1 F.2d 1416, 1424 (9th Cir. 1985).

### 2 III. DISCUSSION

3 Defendant objects to the scope of the Subpoena on the grounds of relevance and trade  
4 secret confidentiality. (Doc. 126 at 7–9.) The Court addresses each argument below.

#### 5 A. Relevance

6 As an initial matter, and although not raised by Plaintiff, the Court finds that Defendant  
7 lacks standing to contest the Subpoena—issued to non-party FTC—under Rule 45 on the basis that  
8 the information sought is irrelevant. *See Krenitsky*, 2020 WL 5017270, at \*1; *Clair v. Schlachter*,  
9 No. 213CV804KJMEFBPTMP, 2016 WL 2984107, at \*5 (E.D. Cal. May 23, 2016) (“A party’s  
10 objection that a subpoena issued to a non-party seeks irrelevant information . . . is not grounds on  
11 which the objecting party has standing to assert, especially where the non-party, itself, has not  
12 objected.”). But in the interest of judicial economy, the Court will construe Defendant’s Motion  
13 to Quash as a motion for a protective order under Rule 26(c). *See Krenitsky*, 2020 WL 5017270,  
14 at \*1 n.1 (“In contrast to a motion to quash, a party has standing to seek a protective order to limit  
15 discovery from a third party.”); *In re REMEC, Inc. Sec. Litig.*, No. CIV 04CV1948 JLS AJB, 2008  
16 WL 2282647, at \*1 (S.D. Cal. May 30, 2008) (explaining that a party can move for a protective  
17 order under Rule 26 “regarding subpoenas issued to non-parties which seek irrelevant  
18 information”).

19 Turning to the substance of the Subpoena, Topic Nos. 1 & 3–8 request documents and  
20 correspondence relating to the Basic Research Enterprise, which is defined by the Subpoena to  
21 include Defendant and ten non-party companies. (*See* Doc. 126-2 at 1–2, 7–8.) Topic No. 2  
22 requests documents regarding several of the Basic Research Enterprise’s dietary supplements,  
23 including the Product. (*See id.* at 2, 7.) Defendant contends that Plaintiff has not shown how  
24 information relating to non-party companies and products not at issue in this case is relevant to  
25 class certification. (Doc. 126 at 5, 7–9.) Plaintiff asserts that the information is relevant to the  
26 “class-wide proof” necessary to establish commonality under Rule 23 because it evidences  
27 Defendant’s “knowledge, notice, and business practices,” in particular Defendant’s “pattern and  
28 practice of selling dietary supplements using false and misleading advertisements,” given that “the

1 Basic Research Enterprise has the same infrastructure, records, owners, and employees as  
2 [Defendant].” (*See id.* at 14, 15.)

3 As explained in the Court’s October 15, 2020 order on Plaintiff’s prior motion to compel  
4 discovery responses, (Doc. 97 at 10), issues relating to Defendant’s knowledge and intent are more  
5 properly characterized as merit-based inquiries, which the Court has bifurcated from class  
6 certification issues. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 465–66  
7 (2013) (noting that while the court’s “class-certification analysis must be rigorous and may entail  
8 some overlap with the merits of the plaintiff’s underlying claim, Rule 23 grants courts no license  
9 to engage in free-ranging merits inquiries at the certification stage.”). The pertinent question at  
10 this time is not whether the requested information is relevant to substantiate Plaintiff’s claims, but  
11 instead whether the information is relevant to substantiate Plaintiff’s class certification allegations.  
12 *See Gusman*, 298 F.R.D. at 595.

13 Based on the operative complaint, the proposed class in this case is defined as “[a]ll persons  
14 residing in California who purchased *the Product* for personal use and not for resale during the  
15 time period May 9, 2014, through the present,” and the only named defendant is SanMedica  
16 International, LLC. (SAC ¶¶ 9, 50, emphasis added.) Plaintiff has not shown how information  
17 regarding non-party companies and products not identified in the definition of the proposed class  
18 is likely to substantiate his class allegations. Therefore, the Court finds that Plaintiff is not entitled  
19 to that discovery at this stage of the case. Plaintiff’s request for this information may be renewed  
20 after the class certification issues are settled.<sup>4</sup> Accordingly, Defendant’s request to limit Topic  
21 Nos. 1 & 3–8 to Defendant SanMedica International, LLC and Topic No. 2 to the SeroVital-hg  
22 Product will be granted.

23 ///

24 \_\_\_\_\_  
25 <sup>4</sup> Plaintiff also points to Defendant’s reliance on the FTC consent order in Defendant’s motion for summary  
26 adjudication regarding the applicable substantiation standard in this case (Doc. 117) and contends that Defendant  
27 cannot rely on the consent order while “prevent[ing] Plaintiff from conducting discovery” regarding the FTC  
28 enforcement action and similar actions. (*See* Doc. 126 at 18–19.) This argument is unavailing. As discussed above,  
the question here is whether the requested information is relevant to substantiate Plaintiff’s class certification  
allegations, and Plaintiff has not made that showing. The Court is not making any finding on whether the information  
is relevant to substantiate Plaintiff’s claims, and Plaintiff may renew his request for the information during any period  
for discovery on the merits.

1     **B.     Trade Secrets**

2           Topic Nos. 4 & 5 seek both redacted and unredacted versions of documents filed and  
3 documents served in any FTC enforcement action against any company within the Basic Research  
4 Enterprise. (*See* Doc. 126-1 at 13.) Defendant contends Topic Nos. 4 & 5 should be modified to  
5 require the production of only redacted versions, as the redactions “would have almost certainly  
6 constituted” a protected trade secret or other confidential information. (*See* Doc. 126 at 8.)  
7 Plaintiff counters that the Protective Order (Doc. 76) adequately safeguards Defendant’s  
8 confidentiality interests. (*See* Doc. 126 at 20.)

9           “[T]he party who moves to quash a subpoena has the ‘burden of persuasion’ under Rule  
10 45(c)(3).” *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005). “[T]here is no  
11 absolute privilege for trade secrets and similar confidential information.” *Gonzales v. Google,*  
12 *Inc.*, 234 F.R.D. 674, 685 (N.D. Cal. 2006) (citation omitted). “Trade secret or commercially  
13 sensitive information must be ‘important proprietary information’ and the party challenging a  
14 subpoena must make ‘a strong showing that it has historically sought to maintain the  
15 confidentiality of this information.’ ” *Id.* at 684 (citation omitted).

16           Here, Defendant has not shown that any redacted information in documents responsive to  
17 Topic Nos. 4 & 5 constitutes protected trade secrets or other confidential information. Defendant’s  
18 cursory and speculative statements that the Subpoena “calls for information . . . that is likely to be  
19 trade secret or other confidential research, development or commercial information” and that  
20 “[a]nything that was redacted in the sought for filings, would have almost certainly constituted a  
21 protected trade secret or other confidential . . . information” (*see* Doc. 126 at 8) is wholly  
22 insufficient to satisfy the requisite standard.

23           Moreover, Defendant fails to address why the Protective Order in this case is insufficient  
24 to protect its confidentiality interests. *See Table de France, Inc. v. DBC Corp.*, No.  
25 EDCV19423JGBKKX, 2019 WL 6888043, at \*4 (C.D. Cal. Aug. 1, 2019) (“to the extent [the  
26 defendant] argues the Subpoenas seek confidential business information, the Protective Order  
27 already issued in the instant matter sufficiently protects [the defendant’s] confidential  
28 information.”). The Protective Order provides that “Confidential Information shall not be used or



disclosed for any purpose other than the prosecution, defense, appeal or settlement of this action,” and “[a]ny party to this action or third party that produces Discovery Materials in this action may designate such material as ‘CONFIDENTIAL’ which it believes, in good faith, contains information . . . that contain[s] trade secrets or other confidential and non-public research, development or commercial information[.]” (Doc. 76 at 3.) By its own terms, the Protective Order “govern[s] potential discovery from third parties who would not otherwise be subject to a private agreement,” and the FTC was served with a copy of the Protective Order along with the Subpoena. (Doc. 76 at 2; Doc. 126-2.) Therefore, Defendant’s request to limit Topic Nos. 4 & 5 to only the redacted versions of responsive documents will be denied.

#### IV. CONCLUSION AND ORDER

Accordingly, Defendant’s Motion to Quash (Doc. 113) is hereby GRANTED IN PART and DENIED IN PART as follows:

1. Construed as a motion for a protective order under Rule 26(c), Defendant’s request to limit Topic Nos. 1 & 3–8 to information and documents pertaining to only Defendant SanMedica International, LLC and Topic No. 2 to documents regarding only the SeroVital Product is GRANTED; and
2. Defendant’s motion to limit Topic Nos. 4 & 5 to require the production of only redacted versions of any responsive documents is DENIED.

IT IS SO ORDERED.

Dated: January 29, 2021

/s/ Sheila K. Oberto

UNITED STATES MAGISTRATE

JUDGE